
INSTALLMENT PURCHASE CONTRACT

BETWEEN

BANC OF AMERICA PUBLIC CAPITAL CORP

AND

CITY OF DURHAM, NORTH CAROLINA

**Dated
August 19, 2015**

INSTALLMENT PURCHASE CONTRACT

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EXHIBIT A FORM OF REQUISITION

THIS INSTRUMENT HAS BEEN PRE-AUDITED
IN THE MANNER REQUIRED BY
THE LOCAL GOVERNMENT BUDGET AND
FISCAL CONTROL ACT.

David Boyd
Finance Director

INSTALLMENT PURCHASE CONTRACT

THIS INSTALLMENT PURCHASE CONTRACT, dated August 19, 2015 (the “*Contract*”), is between **BANC OF AMERICA PUBLIC CAPITAL CORP** (the “*Lender*”), a corporation organized and existing under the laws of the State of Kansas, and the **CITY OF DURHAM, NORTH CAROLINA** (the “*City*”), a municipal corporation duly created and validly existing as such under and by virtue of the Constitution, statutes and laws of the State of North Carolina (the “*State*”), existing as such under and by virtue of the Constitution, statutes and laws of the State;

PREAMBLES

WHEREAS, the City has the power, pursuant to North Carolina General Statutes, Section 160A-20, to (1) purchase real and personal property and (2) enter into installment purchase contracts to finance the purchase of real and personal property used, or to be used, for public purposes;

WHEREAS, the City Council of the City (the “*City Council*”) has previously determined, and hereby further determines, that it is in the best interests of the City to finance the acquisition of motor vehicles (the “*Equipment*”) for its general governmental purposes;

WHEREAS, to obtain the funds to purchase the Equipment, the City Council has determined that it is in the best interests of the City to enter into this Contract with the Lender under which it will make Installment Payments and Additional Payments in consideration thereof;

WHEREAS, the proceeds from the advance of funds by the Lender to the City hereunder (the “*Purchase Price*”) are to be used to purchase the Equipment and for other purposes set forth herein;

WHEREAS, the Lender is willing to advance to the City moneys for the purchase of the Equipment and the City is willing to repay the moneys so advanced as more fully provided herein and, as security for repayment of such moneys, will grant to the Lender, or its designated assignee, a security interest in the Equipment acquired pursuant to this Contract;

WHEREAS, the execution, performance and delivery of this Contract have been authorized, approved and directed by the City Council by a resolution finally passed and adopted by the City Council on August 3, 2015;

WHEREAS, the execution, delivery and performance of this Contract by the Lender have been authorized, approved and directed by all necessary and appropriate action of the Lender;

WHEREAS, the obligation of the City to make Installment Payments and Additional Payments shall constitute a limited obligation of the City, payable solely from currently budgeted appropriations of the City; shall not constitute a general obligation or other indebtedness of the City within the meaning of the Constitution of the State; and shall not constitute a direct or indirect pledge of the faith and credit or taxing power of the City within the meaning of the Constitution of the State;

WHEREAS, in order to secure the obligations of the City hereunder, the City has granted a security interest in the right, title and interest of the City in the Equipment and will execute a North Carolina Uniform Commercial Code Financing Statement for the benefit of the Lender relating to its lien on the Equipment; and

WHEREAS, no deficiency judgment may be rendered against the City in any action for breach of a contractual obligation under this Contract, and the taxing power of the City is not and may not be pledged in any way directly or indirectly or contingently to secure any moneys due under this Contract;

NOW, THEREFORE, for and in consideration of the premises and the mutual covenants herein contained, the parties hereto agree as follows:

ARTICLE I

DEFINITIONS

The following terms have the meanings specified below unless the context clearly requires otherwise:

“Acquisition Fund” means the special escrow fund created under Section 4.1 for the purpose of disbursing a portion of the funds derived from the advance of the Purchase Price in payment of the Cost of Acquisition.

“Additional Payments” means the reasonable and customary expenses and fees of the Lender, any expenses of the Lender in defending an action or proceeding in connection with this Contract and any taxes or any other expenses, including, but not limited to, licenses, permits, state and local income, sales and use or ownership taxes or property taxes which the Lender is expressly required to pay as a result of this Contract (together with interest that may accrue thereon in the event that the City shall fail to pay the same, as set forth herein).

“Lender” means Banc of America Public Capital Corp, a corporation organized under the laws of the State of Kansas, and its successors and assigns.

“Lender Representative” means any person or persons at the time designated to act on behalf of the Lender for purposes of performing any act on behalf of the Lender under this Contract by a written certificate furnished to the City containing the specimen signatures of such person or persons and signed on behalf of the Lender by its vice president.

“Business Day” means a day on which the Lender, at its principal corporate offices, is not required or authorized by law to remain closed.

“City” means the City of Durham, North Carolina or any successor to its functions.

“City Council” means the duly elected City Council of the City, or any successor to its functions.

“City Representative” means (i) the person or persons at the time designated to act on behalf of the City for the purpose of performing any act under this Contract by a written certificate furnished to the Lender containing the specimen signatures of such person or persons and signed on behalf of the City by its City Manager, or (ii) if any or all of the City’s rights and obligations are assigned under this Contract, the person or persons at the time designated to act on behalf of the City and the assignee by a written certificate similarly furnished and of the same tenor.

“*Code*” means the Internal Revenue Code of 1986, as amended, including regulations promulgated thereunder.

“*Completion Date*” means the date by which the City reasonably expects to complete the acquisition of the Equipment.

“*Cost of Acquisition*” shall be deemed to include payment of or reimbursement for the purchase of the Equipment, including:

(a) obligations incurred or assumed in connection with the acquisition of the Equipment;

(b) the cost of the acquisition of the Equipment; including, without limitation, the Lender’s fees and expenses (including the fees and expenses of its counsel) incurred in connection with the delivery of the Purchase Price to the City, fees and expenses of the Local Government Commission, if any, legal fees and expenses, taxes, inspection costs, the cost of permit fees, filing fees and other fees paid in connection with the acquisition of the Equipment;

(c) all other costs which are considered to be a part of the costs of the acquisition of the Equipment in accordance with generally accepted accounting principles and which will not affect the tax status for federal income tax purposes of the designated interest component of Installment Payments payable by the City under this Contract, including sums required to reimburse the City for advances made by the City that are properly chargeable to the acquisition of the Equipment, and including the interest component of Installment Payments prior to the Completion Date; and

(d) payment or prepayment of the principal component of Installment Payments, at the option of the City, from any money remaining in the Acquisition Fund subsequent to the Completion Date.

“*Event of Default*” means one or more events of default as defined in Section 12.1.

“*Financing Statement*” means the North Carolina Uniform Commercial Code Financing Statement setting forth the City as debtor and the Lender as secured party thereunder.

“*Installment Payments*” means those payments made by the City to the Lender as described in Article III and in the Payment Schedule attached hereto.

“*Interest Rate*” means 1.575% per annum, calculated on a 360-day year of twelve 30-day months.

“*Payment Schedule*” means the document attached hereto and incorporated herein by reference, which sets forth the City’s Installment Payments.

“*Purchase Price*” means the total aggregate amount of up to \$[9,500,000] advanced by the Lender to enable the City to acquire the Equipment under the terms of this Contract.

“*State*” means the State of North Carolina.

[END OF ARTICLE I]

ARTICLE II

ADVANCE OF THE PURCHASE PRICE

The Lender hereby agrees to make an advance to the City of the Purchase Price for deposit in the Acquisition Fund created under Section 4.1 hereof, and the City hereby accepts from the Lender the Purchase Price to be held, invested and applied in accordance with the terms and conditions of this Contract. The advance of the Purchase Price is being used to acquire the Equipment.

[END OF ARTICLE II]

ARTICLE III

INSTALLMENT PAYMENTS; ADDITIONAL PAYMENTS

Section 3.1 *Amounts and Times of Installment Payments and Additional Payments.* The City shall repay the Purchase Price in semi-annual payments of the interest components of the Installment Payments beginning on June 1, 2016 and continuing each December 1 and June 1 (each a “*Payment Date*”) thereafter and annual payment of the principal components of the Installment Payments beginning of June 1, 2016 and each June 1 thereafter until June 1, 2021, as provided in this Contract and the attached Payment Schedule. The City hereby approves the advance of the Purchase Price by the Lender to the City pursuant to this Contract in the amount of not to exceed \$[9,500,000] to be repaid by the City in the Installment Payments as provided in this Contract at an interest rate per annum of 1.575%. Each installment shall be deemed to be an Installment Payment and shall be paid in the amounts and at the times set forth on the attached Payment Schedule except as provided herein. If an Installment Payment is due on a day which is not a Business Day, such Installment Payment shall be due on the next succeeding Business Day and the City shall make such Installment Payment on such Business Day with no additional interest due thereon. Installment Payments shall be sufficient in the aggregate to pay the principal and interest components of the Purchase Price as the same become due and payable. The City shall pay Additional Payments on a timely basis directly to the person or entity to which such Additional Payments are owed.

Section 3.2 *Place of Payments.* All payments required to be made to the Lender hereunder shall be made to the Lender at the address set forth in Section 15.4 in immediately available funds or as may be otherwise directed in writing by the Lender.

Section 3.3 *Late Charges.* If the City fails to pay any Installment Payment by the tenth day after such Installment Payment is due, the City shall pay a late payment charge equal to the amount of the delinquency times a per diem rate calculated at the Interest Rate from the tenth day after such Installment Payment was due, plus a late payment charge of 4% of the amount of the past due Installment Payment. If an Installment Payment is due on a day which is not a Business Day, such Installment Payment shall be due on the next succeeding Business Day and the City shall make such Installment Payment on such Business Day with no additional interest due thereon.

Section 3.4 *No Abatement.* There will be no abatement or reduction of the Installment Payments or Additional Payments by the City for any reason, including but not limited to, any failure by the City to appropriate funds to the payment of the Installment Payments or Additional Payments, any defense, recoupment, setoff, counterclaims or any claim (real or imaginary) arising out of or related to the acquisition of the Equipment. The City assumes and shall bear the entire risk of loss and damage to the Equipment from any cause whatsoever, it being the intention of the parties that the Installment Payments shall be made in all events unless the obligation to make such Installment Payments is terminated as otherwise provided herein.

Section 3.5 *Prepayment of Purchase Price.* City shall have the option to prepay its obligations under this Contract on any Payment Date occurring on or after December 1, 2018 (the “*Optional Prepayment Date*”), upon not less than 30 days’ prior written notice, and upon payment in full of all Installment Payments remaining due on such Payment Date. After payment of all amounts owed with respect to this Contract, the City will own the Equipment free and clear of any interest of Lender therein, and Lender’s security interests in and to such Equipment will be terminated.

[END OF ARTICLE III]

ARTICLE IV

ACQUISITION FUND

Section 4.1 Acquisition Fund. There is hereby created a separate fund to be held by the City designated as the “City of Durham 2015 Equipment Installment Financing Acquisition Fund” (the “*Acquisition Fund*”), which shall be maintained separate and apart from other funds of the City. The Purchase Price shall be deposited in the Acquisition Fund, and, together with the earnings from the investment thereof. Pursuant to this Contract, the City grants a security interest to the Lender in the funds held in the Acquisition Fund. Such interest shall terminate with the termination of the Acquisition Fund. The funds in the Acquisition Fund will be disbursed in accordance with the provisions of this Article IV.

Section 4.2 Investment. The City shall invest and reinvest the moneys, and any interest thereon, held in the Acquisition Fund as permitted under Section 159-30 of the General Statutes of North Carolina, as amended. It is anticipated that such funds will be invested in the North Carolina Cash Management Trust. The City shall be solely responsible for ascertaining that all proposed investments and reinvestments comply with federal, state and local laws, regulations and ordinances governing investment of funds held pursuant to a loan agreement similar in substance to the arrangement contemplated by this Contract.

Section 4.3 Disbursements. Money held in the Acquisition Fund is to be disbursed by the City for payment of the Costs of Acquisition after submitting a written requisition requesting approval for such disbursement substantially in the form set forth in Exhibit A attached to this Contract, together with any documents or other items of evidence as the Lender may determine to be necessary to determine the appropriateness of such requisition, to the Lender and receipt of written approval of such disbursement from the Lender.

If amounts held to the credit of the Acquisition Fund are insufficient to pay the Costs of Acquisition, the City shall provide any balance of funds necessary to do so. Any money remaining in the Acquisition Fund on June 1, 2018 is to be transferred to the Lender as a credit against the Installment Payment due from the City on that date.

Section 4.4 Termination. The Acquisition Fund shall be terminated at the earliest of (1) the final distribution of amounts held in the Acquisition Fund or (2) the termination of this Contract.

Section 4.5 Reliance of Lender on Documents. The Lender may act in reliance on any writing or instrument or signature which it believes, in good faith, to be genuine and may assume the validity and accuracy of any statement or assertion contained in such a writing or instrument. The Lender is not liable in any manner for the sufficiency or correctness as to form, manner and execution, or validity of any instrument nor as to the identity, authority, or right of any person executing the same; and their duties under this Contract are limited to the receipt of such moneys, instruments or other documents received by it as the Lender, and for the disposition of the same in accordance herewith.

[END OF ARTICLE IV]

ARTICLE V

COVENANTS WITH RESPECT TO THE EQUIPMENT

Section 5.1 *Care and Use.* The City shall use the Equipment in a careful and proper manner for its governmental purposes, in compliance with all applicable laws and regulations, and, at its sole cost and expense, shall service, repair and maintain the Equipment so as to keep the Equipment in good condition, repair, appearance and working order for the purposes intended, ordinary wear and tear excepted, and shall replace any part of the Equipment as may from time to time become damaged or destroyed, lost or stolen. In addition, the City agrees to comply in all respects with all applicable laws, regulations and rulings of any legislative, executive, administrative, or judicial body, including, without limitation, all anti-money laundering laws and regulations; provided that the City may contest in good faith the validity or application of any such law, regulation or ruling in any reasonable manner that does not, in the opinion of Lender, adversely affect the interest of Lender in and to the Equipment or its interest or rights under this Contract. However, the City is not obligated to renew, repair or replace any inadequate, obsolete, unsuitable, undesirable or unnecessary Equipment. Notwithstanding any provision herein to the contrary, any and all additions to or replacements of the Equipment and all parts thereof constitute accessions to the Equipment and are subject to all the terms and conditions of this Contract and are included in the term “*Equipment*” as used in this Contract.

Section 5.2 *Inspection.* The Lender has the right on reasonable prior notice to the City to enter into and on the premises where the Equipment is located to inspect the Equipment and observe its use during normal business hours. The City further agrees that the Lender has such rights of access to the Equipment as may be reasonably necessary to cause the proper maintenance of the Equipment if the City fails to perform its obligations pursuant to Section 5.1.

Section 5.3 *Alterations and Modifications.* The City may at any time and from time to time, in its sole discretion and at its own expense, make alterations, modifications or attachments to the Equipment; provided, that all such alterations, modifications and attachments are subject to the security interest of the Lender in the Equipment; and provided further, the City shall repair and restore any and all damage to the Equipment resulting from the installation, modification or removal of any such items and such items shall not damage the functional capabilities or economic value of the Equipment.

Section 5.4 *Title.* Title to the Equipment and any and all additions, repairs, replacements or modifications thereto is in the name of the City subject only to the first priority security interest created under this Contract and, on payment of the Installment Payments and other obligations of the City hereunder, or on earlier release as provided in Section 7.4, shall be owned by the City free and clear of any lien or security interest created hereunder as provided in Section 7.4.

Section 5.5 *Personal Property.* The Equipment is, and shall at all times be and remain, personal property notwithstanding that the Equipment or any part thereof may now be, or hereafter become, in any manner affixed or attached to, imbedded in, or permanently resting on, real property or any building thereon or any fixtures.

Section 5.6 *Insurance.* The City shall maintain, or cause to be maintained, at its own expense, except as hereinafter provided, (1) insurance policies written by commercial insurance companies with respect to the Equipment individually valued over \$50,000 and (2) a self-insurance program with respect to the portion of the Equipment individually valued at \$50,000 or less. Any commercial insurance policies shall name the Bank as either an additional insured or a loss payee, as their respective interests may appear. Liability insurance naming Lender and its assigns as additional insured that protects Lender from liability with limits of at least \$10,000,000 for bodily injury and property damage coverage, or such other minimum coverage amount. Worker’s compensation coverage as required

by the laws of the State. Notwithstanding the foregoing, the City may self-insure against the risks described in clauses (a) and/or (b) through a government pooling arrangement, self-funded loss reserves, risk retention program or other self-insurance program, in each case with Lender's prior written consent (which Lender may grant, withhold or deny in its sole discretion) and provided that Purchaser has delivered to Lender such information as Lender may request with respect to the adequacy of such self-insurance to cover the risks proposed to be self-insured and otherwise in form and substance acceptable to Lender.

[END OF ARTICLE V]

ARTICLE VI

RESPONSIBILITIES OF THE CITY

Section 6.1 Utilities. The City shall pay all charges for gas, water, steam, electricity, light, heat or power, telephone or other utility services furnished to or used on or in connection with the Equipment. There shall be no abatement of the Installment Payments on account of interruption of any such services.

Section 6.2 Taxes. The City agrees to pay when due any and all taxes relating to the Equipment and the City's obligations hereunder including, but not limited to, all license or registration fees, gross receipts tax, sales and use tax, if applicable, license fees, documentary stamp taxes, rental taxes, assessments, charges, ad valorem taxes, excise taxes, and all other taxes, licensees and charges imposed on the ownership, possession or use of the Equipment by any governmental body or agency, together with any interest and penalties.

Section 6.3 Risk of Loss.

(a) If the Equipment or any portion thereof is destroyed, in whole or in part, or is damaged by fire or other casualty, except as permitted under subsection (c) below, the City and the Lender will cause the Net Proceeds (as hereinafter defined) of any insurance claim to be applied to the prompt replacement, repair, restoration, modification or improvement of the Equipment. Any balance of the Net Proceeds remaining after such work has been completed shall be retained by the City. Notwithstanding the foregoing, in the event of such damage or destruction after the date on which the Installment Payments are prepayable pursuant to Section 3.5, the City has the option to use such Net Proceeds to prepay that portion of the Installment Payments relating to the Equipment that was substantially damaged or destroyed on the day specified in the City's notice to the Lender of its exercise of the prepayment option, which shall be the Installment Payment date that is at least 60 days succeeding the event resulting in such damage or destruction. For purposes of this Article, the term "*Net Proceeds*" means the amount remaining from the gross proceeds of any insurance claim after deducting all expenses, including attorneys' fees, incurred in the collection thereof.

(b) If the City elects to replace any item of the Equipment (the "*Replaced Equipment*") pursuant to this section, the replacement equipment (the "*Replacement Equipment*") must be of similar type, utility and condition to the Replaced Equipment and of equal or greater value than the Replaced Equipment. The City hereby grants the Lender a first priority security interest in any such Replacement Equipment. The City shall represent, warrant and covenant to the Lender that each item of Replacement Equipment is free and clear of all claims, liens, security interests and encumbrances, excepting only those liens created by or through the Lender, and shall provide to the Lender any and all documents as the Lender may reasonably request in connection with the replacement, including, but not limited to, documentation in form and substance satisfactory to the Lender evidencing the Lender's security interest in the Replacement Equipment. The Lender and the City hereby acknowledge and agree that any Replacement Equipment acquired pursuant to this paragraph constitutes "*Equipment*" for purposes of this Contract. The City shall complete the documentation of Replacement Equipment within 60 days after the occurrence of a casualty event.

(c) Notwithstanding the foregoing, the City is not required to repair or replace in accordance with subsection (b) up to ten items of Equipment (so long as the replacement value of each such piece of Equipment does not exceed \$50,000 and the replacement value, in aggregate, of the ten items of Equipment does not exceed \$280,000). Once the total amount of Equipment that is damaged or destroyed exceeds ten items or an aggregate value of \$280,000, whichever occurs first, the City shall use the Net Proceeds relating to any piece of Equipment that is thereafter damaged or destroyed to prepay this

Contract in accordance with subsection (a), or to repair or replace such Equipment in accordance with subsection (b).

Section 6.4 *Performance by the Lender of the City's Responsibilities.* Any performance required of the City or any payments required to be made by the City may, if not timely performed or paid, be performed or paid by the Lender, and, in that event, the Lender shall be immediately reimbursed by the City for such payments or other performance by the Lender, with interest thereon at the Interest Rate.

Section 6.5 *Financial Statements.* The City agrees that it will furnish the Lender annually, and at such other reasonable times as the Lender shall request, current financial statements (including, without limitation, the City's annual budget as submitted or approved) and such other documents relating to the City's ability to carry out its obligations under this Contract as the Lender shall reasonably request, and permit the Lender or its agents and representatives to inspect the City's books and records and make extracts therefrom. The City represents and warrants to and covenants with the Lender that all financial statements that have been or may be delivered to the Lender fairly and accurately reflect the City's financial condition and there has been and will be no material adverse change in the City's financial condition as reflected in the financial statements since the respective dates thereof.

[END OF ARTICLE VI]

ARTICLE VII

TITLE; LIENS

Section 7.1 Title. Title to the Equipment and any and all additions, repairs, replacements or modifications thereto shall be in the City from and after the date of execution and delivery of this Contract so long as the City is not in default hereunder and shall vest permanently in the City on the payment in full of the principal component of the Installment Payments then outstanding, free and clear of any lien or security interest of the Lender therein. Simultaneously with the execution and delivery of this Contract, the City shall deliver to the Lender the Financing Statement in form suitable for recordation. On payment or provisions for payment in full of all of the City's obligations hereunder, including the principal component of the Installment Payments then outstanding and all other payments due hereunder, the Lender or its assignee, at the City's expense and request, shall terminate the Financing Statement and this Contract will terminate.

Section 7.2 Liens. The City shall not directly or indirectly create, incur, assume or suffer to exist any mortgage, pledge, lien, charge, security interest, encumbrance or claim on or with respect to the Equipment or any interest therein, except for: (1) the lien and security interest of the Lender therein; and (2) such minor defects, irregularities, encumbrances and clouds on title as normally exist with respect to property of the general character of the Equipment and as do not materially impair title to the Equipment so long as the City takes action to remove such liens within 30 days of actual notice of such liens. The City shall promptly, at its own expense, take such action as may be necessary duly to discharge any such mortgage, pledge, lien, security interest, charge, encumbrance or claim if the same shall arise at any time. The City shall reimburse the Lender for any expense incurred by it to discharge or remove any such mortgage, pledge, lien, security interest, charge, encumbrance or claim.

Section 7.3 Security Agreement. To secure all obligations of the City hereunder, the City hereby grants to the Lender under this Contract a security interest in any and all of the City's right, title and interest in the Equipment, all additions, attachments, accessions, substitutions and replacements thereto, and rental payments due or to become due thereunder, and any and all proceeds thereof, including without limitation, the proceeds of insurance thereon. The Lender is authorized to file financing statements without the City's signature or to execute and file such financing statements without the City's signature on the City's behalf as specified by the Uniform Commercial Code in the State of North Carolina related to the Lender's security interest in the Equipment.

Section 7.4 Release of Security Interest. The Lender shall release the security interest in the City's right, title and interest in and to portions of the Equipment and the related additions, attachments, accessions, substitutions, replacements and proceeds with respect thereto (i) on the City's written request (subject to the Lender's reasonable exercise of discretion) or (ii) when the amounts due under this Contract are paid in full or this Contract is otherwise terminated in accordance with the provisions herein. On the release of such Equipment, the City shall provide the Lender with a revised list of Equipment subject to the security interest under this Contract.

Before the release of the security interest in all the Equipment, the City must pay or provide for payment of any rebatable arbitrage with respect to the proceeds of the Purchase Price to be paid to the United States and any other obligations of the City under this Contract. Except as may be necessary to comply with the following paragraph, any substitution of one or more other item(s) of Equipment may only be made to substitute item(s) of Equipment of at least the same approximate economic life and of no less than the same approximate cost (in the aggregate).

On any such agreed release of the security interest with respect to a portion of the Equipment pursuant to this Section, the Lender shall execute and deliver to the City all necessary documents to effect such release of security interest, including any termination statements or partial termination statements.

The City shall deposit in escrow with the Lender any applicable executed documents to effect such release of security interest, in form satisfactory to the Lender. On any such agreed release of the security interest with respect to a portion of the Equipment pursuant to this Section, the Lender shall execute, date and release any applicable documents to the City.

[END OF ARTICLE VII]

ARTICLE VIII

WARRANTIES AND REPRESENTATIONS OF THE CITY

The City warrants and represents to the Lender (all such representations and warranties being continuing) that:

(a) The City is a municipal corporation, validly organized and existing under the laws of the State and has all powers necessary to enter into the transactions contemplated by this Contract and to carry out its obligations hereunder;

(b) The City agrees that during the term of this Contract it will take no action that would adversely affect its existence as a municipal corporation in good standing in the State, cause the City to be consolidated with or merge any political subdivision or another municipal corporation of the State or permit one or more other municipal corporations or political subdivisions of the State to consolidate with or merge into it, unless the City is the surviving municipal corporation or the municipal corporation or political subdivision of the State created thereby expressly assumes in writing the City's obligations hereunder;

(c) This Contract and all other documents relating hereto and the performance of the City's obligations hereunder and thereunder have been duly and validly authorized, executed and delivered by the City and approved under all laws, regulations and procedures applicable to the City including, but not limited to, compliance with public meeting and bidding requirements, and, assuming due authorization, execution and delivery thereof by the other parties thereto, constitute valid, legal and binding obligations of the City, enforceable in accordance with their respective terms, subject to Lenderruptycy, insolvency and other laws affecting the enforcement of creditors' rights generally and such principles of equity as a court having jurisdiction may impose;

(d) Neither the execution and delivery of this Contract nor the consummation of the transactions contemplated hereby, nor the fulfillment of or compliance with the terms and conditions hereof conflicts with or results in a breach of the terms, conditions, or provisions of any restriction or any agreement or instrument to which the City is now a party or by which the City is bound or constitutes a default under any of the foregoing, nor conflicts with or results in a violation of any provision of applicable law or regulation governing the City and no representation, covenant and warranty herein is false, misleading or erroneous in any material respect;

(e) There is no action, suit, proceeding or investigation at law or in equity before or by any court, public agency or body pending or, to the best of the City's knowledge, threatened, against or affecting the City challenging the validity or enforceability of this Contract or any other documents relating hereto and the performance of the City's obligations hereunder and thereunder, and compliance with the provisions hereof or thereof, under the circumstances contemplated hereby or thereby, does not and will not in any material respect conflict with, constitute on the part of the City a breach of or default under, or result in the creation of a lien or other encumbrance on any property of the City (except as contemplated herein or therein) pursuant to any agreement or other instrument to which the City is a party, or any existing law, regulation, court order or consent decree to which the City is subject;

(f) Other than any procedural requirements which are a prerequisite to the acquisition of the Equipment, no approval or consent is required from any governmental authority with respect to the entering into or performance by the City of this Contract and all other documents related thereto and the transactions contemplated hereby and thereby or if such approval is required, it has been duly obtained;

(g) The moneys in the Acquisition Fund and any investment earnings thereon will be used only for the purposes permitted in Article IV;

(h) No approval or consent is required from any governmental authority with respect to the entering into or performance by the City of this Contract and all other documents related thereto and the transactions contemplated hereby and thereby or if such approval is required, it has been duly obtained;

(i) There are no liens or encumbrances on the Equipment other than the lien created by this Contract;

(j) The resolutions relating to the performance by the City of this Contract and the transactions contemplated hereby and thereby, have been duly adopted, are in full force and effect, and have not been in any respect modified, revoked or rescinded;

(k) The acquisition of the Equipment is essential to the proper, efficient and economical operation of the City and the delivery of its services and permit the City to carry out public functions that it is authorized by law to perform;

(l) The City reasonably believes funds will be available to satisfy all of its obligations hereunder;

(m) The City shall (1) cause its City Manager and Finance Director to include the Installment Payments coming due in each fiscal year in the corresponding annual budget request and shall require the City Manager and Finance Director to each use his or her best efforts to obtain an appropriation therefor and (2) require that the deletion of such funds from the City's final budget be made only pursuant to an express resolution of the City Council which explains the reason for such action. This covenant on the part of the City contained in this paragraph shall be deemed to be and shall be construed to impose by law ministerial duties and it shall be the duty of each and every public official of the City to take such action and do such things as are required by law in the performance of the official duty of such officials to enable the City to carry out and perform the covenant in this paragraph and the agreements in this Contract to be carried out and performed by the City. Nothing contained in this paragraph (m) obligates the City to appropriate the moneys that are included in the annual budget request;

(n) Money appropriated by the City to make Installment Payments in any fiscal year shall be used for no other purpose; and

(o) The City is not required to seek or obtain approval from the North Carolina Local Government Commission for execution and delivery of this Contract pursuant to Section 159-148(b)(2) of the North Carolina General Statutes, as amended.

[END OF ARTICLE VIII]

ARTICLE IX

TAX COVENANTS AND REPRESENTATIONS

The City covenants that it will not take any action, or fail to take any action, if any such action or failure to take action would adversely affect the exclusion from gross income for federal income taxation purposes of the interest portion of the obligation created by this Contract under Section 103 of the Code. The City will not directly or indirectly use or permit the use of any proceeds of any fund created under this Contract or any funds of the City, or take or omit to take any action that would cause the obligation created by this Contract to be an “arbitrage bond” within the meaning of Section 148(a) of the Code. The City will maintain books on which will be recorded (1) the Lender or (2) any assignee of the Installment Payments due under this Contract as the registered owner of such Installment Payments. To that end, the City has executed the Arbitrage and Tax Regulatory Certificate, dated August 19, 2015, and will comply with all requirements of Section 148 of the Code to the extent applicable. The City further covenants that this Contract is not a “private activity bond” as defined in Section 141 of the Code.

Without limiting the generality of the foregoing, the City agrees that there shall be paid from time to time all amounts required to be rebated to the United States of America pursuant to Section 148(f) of the Code and any temporary, proposed or final Treasury Regulations as may be applicable to the obligation created by this Contract from time to time. This covenant shall survive the termination of this Contract.

Notwithstanding any provision of this Article, if the City shall provide to the Lender an opinion of counsel to the effect that any action required under this Section or the Arbitrage and Tax Regulatory Certificate is no longer required, or to the effect that some further action is required, to maintain the exclusion from gross income of the interest on the obligation created by this Contract pursuant to Section 103 of the Code, the City and the Lender may rely conclusively on such opinion in complying with the provisions hereof.

The City acknowledges that the Lender is providing the Purchase Price at the Interest Rate based on the premise that the interest component of the Installment Payments received under this Contract is exempt from federal and State taxation and based upon other State and federal laws in effect as of the date hereof. If, as a result of any action or failure to take any action by the City, the income received by the Lender shall be deemed to be taxable income to the Lender by any governmental agency, the Interest Rate and remaining interest component of the Installment Payments will be adjusted upward to provide for the payment of interest by the City at a taxable rate which will preserve the Lender’s after-tax economic yield with respect to the obligation created by this Contract. In such event, the City agrees, to the extent provided by law, to indemnify and hold harmless the Lender from any cost and expense incurred as a result of the loss of the tax-exempt status of the obligation created by this Contract, specifically including without limitation all administrative expenses arising in connection with the amendment of the Lender’s income tax returns. In addition, if any action or failure to take any action or failure to take any action by the City shall adversely affect the Lender’s after-tax economic yield with respect to the obligation created by this Contract, the Interest Rate and the Installment Payments shall be adjusted to produce an after-tax yield to the Lender equivalent to the Lender’s after-tax yield immediately prior to such action or inaction.

[END OF ARTICLE IX]

ARTICLE X

INDEMNIFICATION

To the fullest extent permitted by law, the City hereby agrees to indemnify, protect and save the Lender and its officers, employees, directors, members and agents harmless from all liabilities, obligations, losses, claims, damages, actions, suits, proceedings, costs and expenses, including attorneys' fees that (1) arise in tort (including strict liability claims), in contract, under 42 U.S. Code §1983 or under the public bidding laws of the State or (2) arise out of, are connected with, or result, directly or indirectly, from the Equipment or any portion thereof, including, without limitation, the manufacture, selection, acquisition, delivery, possession, condition, construction, improvement, environmental or other condition, lease, use operation or return of the Equipment or any portion thereof. The indemnification arising under this Article shall continue in full force and effect notwithstanding the payment in full of all obligations under or termination of this Contract.

[END OF ARTICLE X]

ARTICLE XI

DISCLAIMER OF WARRANTIES

Section 11.1 No Representations by the Lender. The City acknowledges and agrees that it has selected the Equipment based on its own judgment and disclaims any reliance on any statements or representations by the Lender with respect thereto.

Section 11.2 Disclaimer by the Lender. The Lender makes no warranties or representations, express or implied, as to the condition, merchantability or fitness for a particular purpose of the Equipment or any other representation or warranty with respect the Equipment.

[END OF ARTICLE XI]

ARTICLE XII

DEFAULT AND REMEDIES

Section 12.1 Definition of Event of Default. The City shall be deemed to be in default hereunder upon the happening of any of the following events of default (each, an “*Event of Default*”):

- (a) The City fails to make any Installment Payment or Additional Payment when due;
- (b) The City fails to budget and appropriate moneys sufficient to pay all Installment Payments and the reasonably estimated Additional Payments coming due in any fiscal year of the City;
- (c) The City deletes from its duly adopted budget any appropriation for the purposes specified in clause (a);
- (d) The City fails to perform or observe any term, condition or covenant of this Contract on its part to be observed or performed, other than as referred to in (a) or (b) above, or breaches any warranty by the City herein or therein contained, for a period of 30 days after written notice specifying such failure and requesting that it be remedied has been given to the City by the Lender unless the Lender shall agree in writing to an extension of such time prior to its expiration;
- (e) Any Lenderrupty, insolvency or reorganization proceedings or similar litigation, is instituted by the City, or a receiver, custodian or similar officer is appointed for the City or any of its property, and such proceedings or appointments are not vacated or fully stayed within 90 days after the institution or occurrence thereof;
- (f) Any warranty, representation or statement made by the City herein or in any other document executed or delivered in connection herewith is found to be incorrect or misleading in any material respect on the date made; or
- (g) An attachment, levy or execution is levied on or against the Equipment;

Section 12.2 Remedies on Default. On the occurrence of any Event of Default, the Lender may exercise any one or more of the following remedies as the Lender, in its sole discretion, shall elect:

- (a) Declare the unpaid portion of the principal component of the Installment Payments then outstanding immediately due and payable without notice or demand to the City;
- (b) Proceed by appropriate court action to enforce performance by the City of the applicable covenants of this Contract or to recover for the breach thereof;
- (c) Exercise all the rights and remedies of a secured party under the general laws of the State with respect to the enforcement of the security interest granted or reserved hereunder including, without limitation, to the extent permitted by law, and take possession of the Equipment without any court order or other process of law, sell or make other disposition of the Equipment in a commercially reasonable manner for the account of the City, and apply the proceeds of any such sale or other disposition, after deducting all costs and expenses, including court costs and attorneys’ fees, incurred with the recovery, repair, storage and other sale or other

disposition, toward the balance due under this Contract and, thereafter, shall pay any remaining proceeds to the City.

NOTWITHSTANDING ANY OTHER PROVISIONS HEREIN, IT IS THE INTENT OF THE PARTIES HERETO TO COMPLY WITH GENERAL STATUTES OF NORTH CAROLINA SECTION 160A-20. NO DEFICIENCY JUDGMENT MAY BE ENTERED AGAINST THE CITY IN FAVOR OF THE LENDER IN VIOLATION OF SECTION 160A-20 INCLUDING, WITHOUT LIMITATION, ANY DEFICIENCY JUDGMENT FOR AMOUNTS THAT MAY BE OWED HEREUNDER WHEN THE SALE OF ALL OR ANY PORTION OF THE EQUIPMENT IS INSUFFICIENT TO PRODUCE ENOUGH MONEY TO PAY IN FULL ALL REMAINING OBLIGATIONS UNDER THIS CONTRACT.

Section 12.3 Further Remedies. This Contract shall remain in full force and effect and the City shall be and remain liable for the full performance of all its obligations hereunder. All remedies of the Lender are cumulative and may be exercised concurrently or separately. The exercise of any one remedy shall not be deemed an election of such remedy or preclude the exercise of any other remedy.

[END OF ARTICLE XII]

ARTICLE XIII

ASSIGNMENT

The City will not sell, assign, lease, sublease, pledge or otherwise encumber or suffer a lien or encumbrance on or against any interest in this Contract or the Equipment without the prior written consent of the Lender. The City's interest herein may not be assigned or transferred by operation of law. The Lender may only transfer and assign its interests in this Contract to a Lender, an insurance company or a similar financial institution with prior written notice approved by the City.

[END OF ARTICLE XIII]

ARTICLE XIV

LIMITED OBLIGATION OF THE CITY

NO PROVISION OF THIS CONTRACT SHALL BE CONSTRUED OR INTERPRETED AS CREATING A PLEDGE OF THE FAITH AND CREDIT OF THE CITY WITHIN THE MEANING OF ANY CONSTITUTIONAL DEBT LIMITATION. NO PROVISION OF THIS CONTRACT SHALL BE CONSTRUED OR INTERPRETED AS CREATING A DELEGATION OF GOVERNMENTAL POWERS NOR AS A DONATION BY OR A LENDING OF THE CREDIT OF THE CITY WITHIN THE MEANING OF THE CONSTITUTION OF THE STATE. THIS CONTRACT SHALL NOT DIRECTLY OR INDIRECTLY OR CONTINGENTLY OBLIGATE THE CITY TO MAKE ANY PAYMENTS BEYOND THOSE APPROPRIATED IN THE SOLE DISCRETION OF THE CITY FOR ANY FISCAL YEAR IN WHICH THIS CONTRACT IS IN EFFECT; PROVIDED, HOWEVER, ANY FAILURE OR REFUSAL BY THE CITY TO APPROPRIATE FUNDS WHICH RESULTS IN THE FAILURE BY THE CITY TO MAKE ANY PAYMENT COMING DUE HEREUNDER WILL IN NO WAY OBVIATE THE OCCURRENCE OF THE EVENT OF DEFAULT RESULTING FROM SUCH NONPAYMENT. NO DEFICIENCY JUDGMENT MAY BE RENDERED AGAINST THE CITY IN ANY ACTION FOR BREACH OF A CONTRACTUAL OBLIGATION UNDER THIS CONTRACT, AND THE TAXING POWER OF THE CITY IS NOT AND MAY NOT BE PLEDGED DIRECTLY OR INDIRECTLY OR CONTINGENTLY TO SECURE ANY MONEYS DUE UNDER THIS CONTRACT. NO PROVISION OF THIS CONTRACT SHALL BE CONSTRUED TO PLEDGE OR TO CREATE A LIEN ON ANY CLASS OR SOURCE OF THE CITY'S MONEYS, NOR SHALL ANY PROVISION OF THIS CONTRACT RESTRICT THE FUTURE ISSUANCE OF ANY OF THE CITY'S BONDS OR OBLIGATIONS PAYABLE FROM ANY CLASS OR SOURCE OF THE CITY'S MONEYS. TO THE EXTENT OF ANY CONFLICT BETWEEN THIS ARTICLE AND ANY OTHER PROVISION OF THIS CONTRACT, THIS ARTICLE SHALL TAKE PRIORITY.

[END OF ARTICLE XIV]

ARTICLE XV

MISCELLANEOUS

Section 15.1 Waiver. No covenant or condition of this Contract can be waived except by the written consent of the Lender. Any failure of the Lender to require strict performance by the City or any waiver by the Lender of any terms, covenants or contracts herein shall not be construed as a waiver of any other breach of the same or any other term, covenant or contract herein. Notwithstanding the foregoing, each of the parties hereto, including the Lender by acceptance hereof, agrees that in any judicial, mediation or arbitration proceeding or any claim or controversy between or among them that may arise out of or be in any way connected with this Contract or any other agreement or document between or among them or the obligations evidenced hereby or related hereto, in no event shall any party have a remedy of, or be liable to the other for, punitive or exemplary damages. Each of the parties hereby expressly waives any right or claim to punitive or exemplary damages they may have or which may arise in the future in connection with such proceeding, claim or controversy, whether the same is resolved by arbitration, mediation, judicially or otherwise.

Section 15.2 Severability. If any portion of this Contract is determined to be invalid under any applicable law, such provision shall be deemed void to the extent of the invalidity and the remainder of this Contract shall continue in full force and effect.

Section 15.3 Governing Law. This Contract shall be construed, interpreted and enforced in accordance with the laws of the State.

Section 15.4 Notices. Any and all notices, requests, demands, and other communications given under or in connection with this Contract are effective only if in writing and either personally delivered or mailed by registered or certified mail, postage prepaid, return receipt requested, addressed as follows:

If to the City: City of Durham, North Carolina
 101 City Hall Plaza
 Durham, North Carolina 27701
 Attention: Finance Director

If to the Lender: Banc of America Public Capital Corp
 VA2-300-18-02
 1111 E. Main Street, 18th Floor
 Richmond, VA 23219

The City and the Lender may, by written notice to the other, designate any further or different addresses to which subsequent notices, certificates or other communications shall be sent.

Section 15.5 Section Headings. All section headings contained herein are for convenience of reference only and are not intended to define or limit the scope of any provision of this Contract.

Section 15.6 Entire Contract. This Contract, together with the schedules and Exhibits hereto, constitutes the entire Contract between the parties and this Contract shall not be modified, amended, altered or changed except as the City and the Lender may subsequently agree in writing.

Section 15.7 Binding Effect. Subject to the specific provisions of this Contract, this Contract is binding on and inures to the benefit of the parties and their respective successors and assigns (including expressly any successor of the Lender).

Section 15.8 Time. Time is of the essence of this Contract and each and all of its provisions.

Section 15.9 If Payment or Performance Date Not a Business Day. If the date for making payment, or the last date for performance of any act or the exercising of any right, as provided in this Contract, is not a Business Day, such payment may be made or act performed or right exercised on the next succeeding Business Day, with the same force and effect as if done on the nominal date provided in this Contract, and no interest shall accrue for the period after such nominal date.

Section 15.10 Covenants of City not Covenants of Officials Individually. No covenant, stipulation, obligation or agreement contained herein shall be deemed to be a covenant, stipulation, obligation or agreement of any present or future member, agent or employee of the City in his individual capacity, and neither the members of the City Council nor any other officer of the City Council or the City shall be subject to any personal liability or accountability by reason of the execution and delivery of this Contract. No member of the City Council or any agent or employee of the City shall incur any personal liability in acting or proceeding or if not acting or not proceeding, in good faith, reasonably and in accordance with the terms of this Contract.

Section 15.11 Execution in Counterparts. This Contract may be executed in any number of counterparts, each of which shall be an original and all of which shall constitute but one and the same instrument.

[SIGNATURES BEGIN ON THE FOLLOWING PAGE]

IN WITNESS WHEREOF, the parties hereto have caused this Contract to be executed by their duly authorized officers as of the day and year first above written.

CITY OF DURHAM, NORTH CAROLINA

[SEAL]

By: _____
David Boyd
Finance Director

[SIGNATURES CONTINUED ON THE FOLLOWING PAGE]

[COUNTERPART SIGNATURE PAGE TO THE INSTALLMENT PURCHASE CONTRACT
BETWEEN THE CITY OF DURHAM, NORTH CAROLINA AND BANC OF AMERICA PUBLIC CAPITAL CORP]

BANC OF AMERICA PUBLIC CAPITAL CORP

By: _____
Its: _____

[SIGNATURES CONTINUED ON THE FOLLOWING PAGE]

PAYMENT SCHEDULE

<u>DATE</u>	<u>INSTALLMENT PAYMENT</u>		<u>TOTAL</u>
	<u>PRINCIPAL COMPONENT</u>	<u>INTEREST COMPONENT</u>	
6/1/2016	\$ 340,000.00	\$ 41,700.75	\$ 381,700.75
12/1/2016		23,940.00	23,940.00
6/1/2017	675,000.00	23,940.00	698,940.00
12/1/2017		18,624.38	18,624.38
6/1/2018	675,000.00	18,624.38	693,624.38
12/1/2018		13,308.75	13,308.75
6/1/2019	675,000.00	13,308.75	688,308.75
12/1/2019		7,993.13	7,993.13
6/1/2020	680,000.00	7,993.13	687,993.13
12/1/2020		2,638.13	2,638.13
6/1/2021	<u>335,000.00</u>	<u>2,638.13</u>	<u>337,638.13</u>
Total	\$3,380,000.00	\$174,709.50	\$3,554,709.50

EXHIBIT A

FORM OF REQUISITION

Banc of America Public Capital Corp
Richmond, VA

Re: Direction to Make Disbursements from the City of Durham 2015
Equipment Installment Financing Acquisition Fund

Ladies and Gentlemen:

Pursuant to Section 4.3 of the Installment Purchase Contract dated August 19, 2015 (the “*Contract*”), between Banc of America Public Capital Corp and the City of Durham, North Carolina (the “*City*”), you are hereby requested to approve for disbursement from the City of Durham 2015 Equipment Installment Financing Acquisition Fund (the “*Acquisition Fund*”) the amount indicated below.

The undersigned hereby certifies:

1. This is requisition number _____ from the Acquisition Fund.
2. The name and address of the person, firm or corporation to whom the disbursement is due is as follows:

3. The amount to be disbursed is \$_____.
4. The purpose of the disbursement is to _____.
5. The disbursement herein requested is for an obligation properly incurred, is a proper charge against the Acquisition Fund as a Cost of Acquisition under the Contract and such obligation has not been the basis of any previous disbursement.
6. The representations and warranties contained in the Contract are true and correct as of the date hereof.
7. No Event of Default, as such term is defined in the Contract, or event which with the giving of notice or passage of time or both would constitute an Event of Default, has occurred.

[SIGNATURE APPEARS ON THE FOLLOWING PAGE]

DATED this ____ day of _____, ____.

CITY OF DURHAM, NORTH CAROLINA

By: _____
City Representative

APPROVED:

BANC OF AMERICA PUBLIC CAPITAL CORP

By: _____
Authorized Representative